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COURT OF APPEALS

No. 34418-1-II

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STATE OF WASHINGTON
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**COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION II**

THURSTON COUNTY and its BOARD OF HEALTH,
Appellants,

and

BRUCE CARTER, SHARI RICHARDSON, GEORGIA BICKFORD,
BARBARA BUSHNELL and JANE ELDER BOGLE,
Appellant Interested Parties.

v.

JEFF GRIFFIN,
Respondent

THURSTON COUNTY'S REPLY BRIEF

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I. INTRODUCTION

This reply brief is submitted in order to rebut the arguments set forth in the Respondent's opening brief.

II. ARGUMENT

The essential issue in this case is whether the Thurston County Board of Health erred in denying the on-site septic system permit to Mr. Griffin for his extremely undersized lot on Steamboat Island adjacent to Puget Sound. The respondent, Mr. Griffin, argues that the Court should grant the Board of Health (Board) no deference because the Board is "interpreting a model ordinance, the language of which was drafted by the Department of Health, and the Board therefore lacks expertise with respect to its intended meaning". Resp't br. pp. 24-25.

In support of this statement, Mr. Griffin cites *Crescent Convalescence Center v. Dep't of Social and Health Services*, 87 Wn. App. 853, 942 P.2d 981 (1997) and *Russell v. Dep't of Human Rights*, 70 Wn. App. 408, 854 P.2d 1087 (1993). Those two cases are not on point. The *Crescent Convalescence Center* case involved an issue as to whether a nursing home had a constitutional right to an administrative hearing. The Court concluded that because DSHS has no expertise in constitutional law its legal conclusions are not entitled to deference by the Court. This,

of course, is not the issue here, and the Board of Health does have expertise to decide whether a septic permit should issue.

In the *Russell* case, which involved a claim of sexual and racial discrimination, the Court held that an administrative agency has no special expertise in interpreting court rules and, therefore, the Court should grant no deference to the Department of Human Rights' interpretation of the court rules. Unlike *Russell*, the Thurston County Board of Health wrote the regulations at issue here, and, therefore, the Court should defer to the Board's interpretation of those rules.

Here, the County is asking the Court to defer to the interpretation of the Board of Health's own rules and not a determination or interpretation of constitutional law or of the court rules. It is proper and appropriate for the Court to defer to the Board of Health's interpretations of its own rules. *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). In *Anderson*, the court deferred to Pierce County's decision to address the probable environmental impacts of a proposed development by way of a mitigated determination of non-significance.

Mr. Griffin is unable to distinguish the case of *Schofield v. Spokane County*, 96 Wn. App. 581, 980 P.2d 277 (1999) from this case. In the former case, Mr. Schofield applied to Spokane County for land use approvals on Spokane Rivers' Long Lake which would have resulted in

six of ten lots being along the river and four lots away from the river. After a hearing, the Hearing Examiner conditionally approved Mr. Schofield's proposal, including on-site sewage disposal for all lots including those along the river. Neighbors to the project appealed to the Spokane County Board of Health and the Board reversed and denied the application. The Court of Appeals noted that its review of the Spokane County Board of Health decision was deferential and that it viewed the evidence and all reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority. *Schofield* at 586. In addition, the Court noted that deference should be given to an agency's interpretation of the law where the agency has special expertise in dealing with such issues. *Schofield* at 587. The Court noted that the Spokane Board's interpretation was factually sound and not clearly erroneous because allowing individual septic systems in close proximity to each other and to a water body creates an inference of risk inconsistent with the rules. *Schofield* at 588.

Principals of deference applied in this case require a result affirming the Thurston County Board of Health's decision to deny the on-site septic system permit in this matter. Thurston County Sanitary Code (SC) art. IV § 21.4.5.3 states that the Health Officer may permit the installation of an OSSS (On-Site Septic System) where "the minimum

land area requirements or lot sizes cannot be met only when the proposed system meets all requirements of these regulations other than minimum land area.”

Here the lot at issue is only 2,850 square feet which is 1/5 of the required minimum 12,500 square foot lot under the Sanitary Code, therefore, all of the other requirements must be met. Here the proposed OSSS does not meet all of the requirements, which include 1) a water table evaluation; 2) separation between the septic tank and pump chamber of 10 feet; 3) horizontal set back between the disposal component and the building foundation of ten feet; 4) horizontal set back between the disposal component and the adjacent property line of five feet; 5) horizontal set back between disposal component and surface water of 100 feet; and 6) and a minimum design flow for a single family residence of 240 gallons per day. Applying the principals of *Schofield*, this Court must defer to the Thurston County Board of Health’s interpretation of its own Sanitary Code and uphold the Board’s decision to deny the permit.

Mr. Griffin makes a statement at page 37 of his brief that has no basis in fact or law that “the risk that a septic system allegedly poses to Puget Sound has nothing whatsoever to do with the size of the lot upon which the system is placed.” Quite the contrary, the record shows that the risk that a septic system poses to Puget Sound has everything to do with

the size of the lot upon which the system is placed. See Finding of Fact 13, AR 2. "Lot size will affect the amount of dilution of the remaining contaminants in the effluent as it leaves the soil envelope before or as it mingles with the groundwater. Lot size also influences what other contaminants are added to the groundwater through gardening, fertilizer use, etc. Another factor that has been used in establishing lot size in properties developed with on-site sewage systems is a *de facto* approach to land use planning. ... This set of minimum lot sizing criteria was based on what was needed to properly treat and dispose of the sewage and on the ability to fit the necessary structures on the lots while meeting set back requirements." AR 160-161. "The main issues that effect minimum lot size are: 1) what is necessary to physically place the house, driveway, other development, and the on-site sewage system and its reserve area on the property and still maintain the necessary set backs; 2) what is necessary to prevent degradation of groundwater with pollutants from the on-site system (pathogens, nitrates) and the other development on the property; impervious surfaces, landscaping fertilizers and other chemicals)." AR 160. "The purpose of minimum lot sizes is to ensure that the development structures, driveways, and the on-site sewage system, including the reserve area, will physically fit on the property while complying with all of the required set backs. At the same time, the goal of

an on-site sewage system is to treat and dispose of wastewater in a manner which protects public health and the receiving environment.” AR 160. It is clear that lot size is directly related to how an OSSS will perform to protect Puget Sound.

In support of his argument that art. IV § 21.4.5.3 SC is

unconstitutionally vague, Mr. Griffin cites *City of Seattle v. Crispin*, 149

Wn.2d 896, 71 P.3d 208 (2003). In that case, the Court held that a tax lot

was legally created within the statutory exemption under RCW

58.17.040(6) when the reconfiguration of boundaries resulted in no new

lots. The Thurston County Sanitary Code was not at issue in *Crispin* and

art. IV § 21.4.5.3 SC is clear and a person of common intelligence would

see that unless his or her property, consisting of an undersized lot, met all

of the other requirements of the Sanitary Code that an on-site sewage

system may not be granted for his or her property.

Another case cited by Mr. Griffin in support of his unconstitutional

vagueness argument is *City of Seattle v. Eze*, 111 Wn.2d 22, 759 P.2d 366

(1988). That case is also not on point. There the Court held that a Seattle

Ordinance which prohibited disorderly conduct on a public bus was not

vague because the terms “loud or raucous” were not inherently vague

when the words had through daily use acquired a content that conveyed to

any interested person a sufficiently accurate concept of what was

forbidden. A person of ordinary intelligence can read the Thurston County Sanitary Code and know that a 2,850 square foot lot is not suitable for an OSSS unless all the other requirements of the Code can be met.

Another case cited by Mr. Griffin in support of his unconstitutional vagueness argument is *Myrick v. Pierce County Commissioners*, 102 Wn.2d 698, 677 P.2d 140, 687 P.2d 1152 (1984). In that case, the Supreme Court held that a massage parlor regulation which required masseuses to be fully clothed was void for vagueness since the ordinance did not give fair warning of what manner of dress would run afoul of the law. The Board of Health rule at issue here dealing with on-site sewage systems is not unconstitutionally vague because it gives fair warning that unless an under sized lot meets all other set back requirements then an on-site sewage system may not be granted.

Mr. Griffin also cites *Burien Bark Supply v. King County*, 106 Wn.2d 868, 725 P.2d 994 (1986) in support of his unconstitutional vagueness argument. There King County officials had ordered Burien Bark Supply to cease use of a bark sorter on a site zoned for general commercial use. The Supreme Court held that the ordinance was unconstitutionally vague in its application to Burien Bark Supply because the zone did allow for limited manufacturing and processing on site. Here, the Sanitary Code does not leave to the discretion of County officials the

substance of determining what activity is prohibited. Art. IV § 21.4.5.3

SC clearly states that unless a substandard size lot meets all of the other requirements then an on-site sewage system permit may not be granted.

In addition, Mr. Griffin cites *Anderson v. City of Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (1993). In that case, the Court of Appeals held that certain design review ordinances in the City of Issaquah which did not give effective or meaningful guidance to design professionals as to whether a building was interesting and harmonious with Issaquah Valley and the Cascade Mountains were unconstitutionally vague. Such is not the case here under the Thurston County Sanitary Code which specifically sets forth the required set backs and specifications for an OSSS on an under sized lot.

The final case cited by Griffin in support of his unconstitutional vagueness argument is *Grant County v. Ohne*, 89 Wn.2d 953, 577 P.2d 138 (1978). In that case the county sought to require certain property owners to remove a mobile home from their property on the basis of a claimed violation of the building code. The owners had obtained a variance permit for a mobile home on the lot several years prior to actually moving the home onto the property. Because the building regulation did not prohibit mobile homes specifically, the court held that the building

code section was unconstitutionally vague. This case does not apply to the clear Sanitary Code section in Thurston County applicable here.

The next argument that Mr. Griffin makes is that the Board's decision denying him his on-site septic permit violated his vested rights. Such is clearly not the case. Art. IV § 21.4.5.3 SC was in place at the time that Mr. Griffin applied for his permit. No provision of the Sanitary Code was changed subsequent to his application that is being applied in this case. In *Thurston County Rental Owners Association v. Thurston County*, 85 Wn. App. 171, 931 P.2d 208 (1997) the Court of Appeals made it clear that requiring a sewage system operation permit does not deprive owners of a vested right.

Finally, Mr. Griffin argues that denial of his on-site sewage system permit violates his substantive due process rights. The Superior Court properly dismissed Mr. Griffin's substantive due process arguments. Clearly, the regulation that requires an undersized lot to meet all of the requirements of the on-site sewage system permit rule is aimed at achieving a legitimate public purpose. Under *Ford v. Bellingham-Whatcom County District Board of Health*, 16 Wn. App. 709, 558 P.2d 821 (1977), septic tank regulations are proper exercises of the police power to protect the health and safety of a community. Protecting the public health and preventing contamination of ground and surface water

are serious public health and environmental concerns. The County has used means that are reasonably necessary to achieve the purpose of protecting the public health and water quality by requiring a minimum lot size and set backs. Finally, the County's actions are not unduly oppressive. Mr. Griffin knew at the time he purchased the property that recreational use of the property was the highest and best use of the property. The fact that residential use of the property could not be made was acknowledged by Mr. Griffin's realtor. AR 195. Recreational use of small waterfront properties on Puget Sound shorelines are a reasonable use of such properties. See *Buschel v. Dep't of Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994). There is nothing unduly oppressive regarding the County's decision. Mr. Griffin is free to use the property for recreational purposes.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in Appellant's opening brief, the Court should reverse the trial court's decision and uphold the

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Thurston County Board of Health decision that an on-site sewage system permit should be denied.

DATED this 26th day of September, 2006.

EDWARD G. HOLM
PROSECUTING ATTORNEY

Allen T. Miller

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A copy of this document was delivered to the following individual(s) on September 26, 2006.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: September 26, 2006

Signature: [Signature]

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A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on September 26, 2006.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

September 26, 2006

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